SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

71 —

EMERY AIR FREIGHT CORPORATION,

Petitioner,

against

LOCAL UNION 295, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and JAMES COSTA, President, and HARRY DAVIDOFF, Secretary-Treasurer and JOHN MORAN and MICHAEL HUNT, Shop Stewards of Local 295,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petitioner, Emery Air Freight Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-captioned action on September 24, 1971.

Citations to Opinions Below

The Findings of Fact and Conclusions of Law and the Order Granting Preliminary Injunction of the United States District Court for the Eastern District of New

York, printed in Appendix B hereto, *infra*, pp. 5a-14a, were not officially reported. The opinion of the Court of Appeals for the Second Circuit, printed in Appendix C hereto, *infra*, pp. 15a-34a, is reported in 449 Fed. 2d 586 (1971).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 24, 1971, printed in Appendix C, *infra*, 35a and 36a.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1).

Question Presented

Where a dispute exists as to the existence of a collective bargaining agreement, and after the United States District Court has determined the viability of such agreement, is the Court powerless to issue a preliminary injunction enjoining a strike, which violates the no-strike provisions of the agreement?

Statutes Involved

The statutory provisions involved are Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 185(a); Section 4 of the Norris-LaGuardia Act, 29 U.S.C. Section 104; and Title 28, U.S.C. Section 1254(1). The Statutes are printed in Appendix A, *infra*, pages 1a-4a.

Statement of the Case

Petitioner, Emery Air Freight Corporation, seeks review of a judgment of the United States Court of Appeals for the Second Circuit which reversed an Order of the District Court granting a preliminary injunction enjoining

the respondent union from engaging in a strike in violation of the no-strike provisions of a collective bargaining agreement.

Petitioner is engaged in the air-freight-forwarding business, and the respondent is the collective bargaining representative for the (i) truck drivers, platform men, (ii) messengers, and (iii) clerical employees employed by the petitioner in the Metropolitan New York area. There are three separate collective bargaining agreements. However, the agreement germane to the issues involved in this appeal pertains to the truck drivers and platform men.

Negotiations for the renewal of the drivers' and platform men's contract were concluded on December 15, 1970, with the signing of a Supplemental Agreement renewing the prior contract upon specific terms and conditions. Four months after the agreement had been signed, and after having received all of the benefits specified in the new agreement (namely, wage increases, new severance fund payments, collection of union dues, and payment of disability benefit premiums), the respondent union submitted a printed collective bargaining agreement which differed materially from the agreement which had been reached in December. The petitioner was directed to sign the document "as is" or suffer a strike. Within twenty minutes of petitioner's refusal to sign the proffered document, the respondent proceeded to strike petitioner's place of business.

Petitioner instituted an action in District Court seeking to enforce the terms of the collective bargaining agreement and obtained a Temporary Restraining Order enjoining the respondent from engaging in strike action. For approximately six days, despite a series of oral and written directives from the Court, the respondent ignored the Temporary Restraining Order.

At the conclusion of a hearing before the District Court, and based upon the overwhelming and uncontradicted evi-

dence introduced into the record, Judge Bruchhausen made Findings of Fact and Conclusions of Law which confirmed the fact that the parties entered into a new, binding collective bargaining agreement containing a broad no-strike provision, on or about December 15, 1970, as petitioner contended.

A Preliminary Injunction was issued by the Court prohibiting the respondent from engaging in a strike, concerted work stoppage, or tie-up at petitioner's premises.

Upon appeal, the United States Court of Appeals for the Second Circuit, relying upon the provisions of Section 4 of the Norris-LaGuardia Act, and noting this Court's decision in *The Boys' Market, Inc.* v. *Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970), held that the Preliminary Injunction was improper and remanded the case for further proceedings.

Reasons for Granting Writ

It is urged that the Court of Appeals' reliance upon *Boys' Market, Inc.*, is misplaced and does violence to the philosophy of Federal Labor Law enunciated by this Court during the past decade.

The Court of Appeals reviewed the facts surrounding the issuance of the preliminary injunction and came to the conclusion that the injunction could not stand since the major dispute between the parties was whether or not a new contract existed, an issue which was not arbitrable and therefore not within the standard set forth in Boys' Market.

In The Boys' Market case this Court suggested the following principles for the guidance of the District Courts:

> "A District Court entertaining an action under § 301 may not grant injunctive relief against con-

certed activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." 370 U.S., at 228, 82 S.Ct., at 1346. (Emphasis in original.)

The Court of Appeals for the Second Circuit, in applying the foregoing principles, determined that:

"This dispute was not arbitrable because Emery and Local 295 had never agreed to make it so. Emery does not claim that this was an arbitrable question and the trial court did not so find. That the issue whether a new contract existed was decided by the court on June 11, after the evidentiary hearing of April 30, if anything, shows that no one regarded that issue as arbitrable. Therefore, under the Norris-LaGuardia Act, and the *Boys Markets* reading of it, the preliminary injunction was improper because the '"strike . . . sought to be enjoined . . . [was not] over a grievance which both parties are contractually bound to arbitrate."' 398 U.S. at 254, citing *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. at 228 (dissenting opinion)."

Carrying the Court of Appeals' rational to its ultimate conclusion, one could obviate the necessity for complying with the terms of a collective bargaining agreement merely by questioning the validity or existence of such an agree-

nient, and since the issue would not be arbitrable, the District Court would be effectively precluded from providing adequate and timely relief to an aggrieved party.

The determination that equitable remedies are not available to enforce the no-strike provisions of an agreement, because there is no arbitrable issue, is a distortion of the reasoning in The Boys' Market decision.

One of the objectives which the Norris-LaGuardia Act sought to achieve has long since been accomplished. Unions have matured and taken their rightful place in the development of our nation. Today they have power, prestige and strength. However, the binding collective bargaining agreements which labor and management voluntarily enter into create rights, duties and obligations for both signatories to the contract.

Congress, through the enactment of the Labor Management Relations Act, and this Court, in its wisdom, have long recognized the need to accommodate the broad general sections of the Norris-LaGuardia Act with the more specific aims set forth in the Labor Management Relations Act.

There is impressive authority for the proposition that Section 301 of the Labor Management Relations Act affords either party the right to obtain redress in the Federal Court, including injunctive relief, to enforce the provisions of a collective bargaining agreement, notwithstanding the prohibition set forth in the Norris-LaGuardia Act.

In *Textiles Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), it was clearly established by this Court that Section 301 was not merely procedural but intended to create a substantive body of Federal Labor Law. This Court held that the failure to arbitrate was not one of the abuses against which the Norris-LaGuardia Act was intended, and refused to apply the procedure requirements of the Norris-LaGuardia Act in suits seeking to enforce contracts to arbitrate.

The *Brotherhood of Railroad Trainmen* v. *Chicago River Industrial Railroad* decision, 353 U.S. 30 (1957), established that, despite the provisions of the Norris-LaGuardia Act, the Federal Court may enjoin strikes over disputes as to the interpretation of existing collective bargaining agreements.

In the *Steelworkers Trilogy* [*United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)] arbitration was deemed to be the foundation of Federal Labor Law; arbitration was the consideration given in exchange for the no-strike provision; the Federal Courts enforced an arbitrator's award to foster peaceful settlement of labor disputes.

In *Local 174, Teamsters*, v. *Lucas Flour Company*, 369 U.S. 95 (1962), the concept of quid pro quo was extended by implication even where the agreement did not contain express no-strike language.

The common thread running through all of these decisions becomes readily apparent. Parties to a collective bargaining agreement will be required to honor their commitments which were voluntarily made, and the Courts will provide relief where a material breach occurs.

The District Court held that, contrary to the position taken by respondent union, the parties did enter into a valid, binding agreement on December 15, 1970. Thus the basis upon which the respondent rested its right to strike crumbled. If the contract was in full force the respondent, by engaging in a strike, was in violation of its provisions.

The holding by the Court of Appeals for the Second Circuit creates the anomalous situation that it recognizes the fact that the District Court has the power to require parties to submit issues arising from a collective bargain-

ing agreement to an arbitrator for resolution, but nevertheless determines that the District Court lacks jurisdiction to grant an injunction in an action which seeks to enforce the non-strike provisions of the very same agreement.

If the District Court, notwithstanding the strictures imposed by the Norris-LaGuardia Act, has the power, and it obviously does, to compel performance of the provisions calling for arbitration, surely it possesses the power to enforce the no-strike provision which is an integral part of the arbitration provision.

The necessity that parties arbitrate their disputes is no less significant than the obligation that they be bound by their agreements. What purpose can a contract serve if a union can capriciously disavow its obligations under the agreement?

The question regarding the existence or nonexistence of the collective bargaining agreement is a matter which should properly be resolved in a court of law. Once the existence of the contract has been established, injunctive relief is the only certain method of enforcing the rights flowing from it. There is no lack of capacity in the District Court to direct complete performance of the obligations created thereunder.

An award for money damages is illusory at best, and certainly is no substitute for an immediate cessation of a strike which is clearly in violation of the collective-bargaining agreement. Moreover, experience has shown that an action in damages may tend to irritate and aggravate sensitive wounds, creating an effect which is the exact reverse of our declared Federal Labor policy. The injunction is the only effective deterrent to arbitrary and capricious violations of a no-strike pledge.

The entire corpus of Federal Labor Law in the past decade, with the single exception of the *Sinclair Refining Co.* v. *Atkinson* decision, 370 U.S. 195 (1962) has promoted

industrial peace through the substitution of arbitration for the strike. Both the Congress and this Court have been concerned that legal argument replace contests of economic muscle so that justice and not mere preponderance of power might determine labor settlements.

This decision by the Court of Appeals for the Second Cricuit runs counter to these principles.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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ROBERT D. FOGLIA
Counsel for Petitioner

APPENDIX A

(Statutory Provisions Cited and Quoted)

1. Section 301, Labor-Management Relations Act of 1947, 29 U.S.C. § 185:

§ 185. *Suits by and against labor organizations—Venue, amount, and citizenship*

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Appendix A

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

2. Section 4, Norris-LaGuardia Act, 29 U.S.C. § 104:

§ 104. *Enumeration of specific acts not subject to restraining orders or injunctions*

No court of the United States shall have jurisdiction to issue any restraining order or temporary

or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or in prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

TITLE 28, UNITED STATES CODE, SECTION 1254(1)

Section 1254. Courts of Appeals; Certiorari; Appeal; Certified Questions.

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree".

APPENDIX B

(Findings of Fact, Conclusions of Law and Order of Preliminary Injunction of United States District Court for the Eastern District of New York)

(Findings of Fact and Conclusions of Law)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

EMERY AIR FREIGHT CORPORATION,

Plaintiff,

against

LOCAL UNION 295, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; JAMES COSTA, President; HARRY DAVIDOFF, Secretary-Treasurer; JOHN MORAN and MICHAEL HUNT, shop stewards of Local Union 295.

Defendants.

This cause came on to be heard by the Court, the Honorable Walter Bruchhausen, United States District Judge, presiding, on the 30th day of April, 1971, on the motion of the plaintiff for a preliminary injunction and the Court having considered the verified complaint dated April 22, 1971; the Order to Show Cause and Temporary Restraining Order signed by Judge Mishler April 22, 1971, for a preliminary injunction; the Order to Show Cause dated April 24, 1971, signed by Judge Jack B. Weinstein seeking to adjudge defendant; in contempt of this Court; the Affidavits of Robert D. Foglia, Esq., and James B. Brown dated April 22, 1971, in support thereof; the Order to Show Cause dated April 23, 1971, signed by Judge Mishler seeking to

vacate the Temporary Restraining Order; the Order of Judge Walter Bruchhausen dated April 26, 1971, continuing the Temporary Restraining Order and directing the picketing to cease; the final order upon Contempt Proceedings dated April 27, 1971, signed by Judge Walter Bruchhausen; Order to Show Cause to vacate Temporary Restraining Order dated April 23, 1971; and the Order of Judge Walter Bruchhausen continuing the Temporary Restraining Order in full force and effect dated April 26, 1971; the testimony of witnesses; the documents and exhibits; and having heard the arguments of counsel, finds the facts and states the conclusions of law as follows:

1. The plaintiff, Emery Air Freight Corporation (hereinafter referred to as "Emery"), is a corporation duly organized and existing under the laws of the State of Delaware and is authorized to transact business in the State of New York.

2. Defendant Local Union 295 (hereinafter referred to as "Local Union") is an unincorporated association affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "IBT").

3. The defendant Harry Davidoff (hereinafter respectfully referred to as "Davidoff") is Secretary-Treasurer; the defendant James Costa is President; the defendant Michael Hunt is a shop steward; and the defendant John Morain is a shop steward of defendant Local Union.

4. The plaintiff, Emery, is in the air-freight-forwarding business and employs approximately 300 people in five locations in the New York City area. These 300 people are represented by the defendant Local Union.

Appendix B

5. Plaintiff, Emery, and defendant Local Union executed and entered into a Collective-Bargaining Agreement covering the period between November 30, 1967, through December 1, 1970. This agreement pertained to truck drivers, helpers, and platform men.

6. On or about the 25th day of November, 1970, Local Union agreed to an extension of the collective-bargaining agreement due to expire on December 1, 1970.

7. On or about December 15, 1970, the plaintiff Emery and defendant Local Union entered into a new collective-bargaining agreement covering the truckdrivers, helpers, and platform men for the period December 1, 1970, through November 30, 1973.

8. The new collective-bargaining agreement consisted of the collective-bargaining agreement which was to expire on November 30, 1970, and the Supplementary Agreement which incorporated additional terms and conditions. This new collective-bargaining agreement was made retroactive to December 1, 1970.

9. That commencing on December 15, 1970, and continuing thereafter the members of Local Union employed by Emery received an increase in wages in accordance with the wage scale set forth in the new collective-bargaining agreement, and each such member received the difference in money between the old wage level and the new wage level under the provisions of the new collective-bargaining agreement for the period of December 1, 1970, through December 15, 1970.

10. That the plaintiff Emery continued to make Pension and Welfare payments in accordance with the provisions of the new collective-bargaining agreement.

Appendix B

11. That commencing on December 15, 1970, the plaintiff Emery made disability benefit payments, which were retroactive to December 1, 1970, pursuant to the terms of the new collective-bargaining agreement.

12. Commencing on or about December 15, 1970, the plaintiff Emery made payments into the newly established escrow severance fund created by the terms of the new collective bargaining agreement for the benefit of the Truck Drivers, Helpers, and Platform Men employed by the plaintiff Emery who are members of Local Union.

13. That the members of Local Union who are employed by the plaintiff, Emery, ratified the new collective-bargaining agreement which included a trust provision for the aforementioned severance fund.

14. That the plaintiff Emery has continued to pay the union dues of the members of Local Union employed by the plaintiff, in accordance with the provisions of the new collective-bargaining agreement.

15. The new collective-bargaining agreement entered into on or about December 15, 1970, [contained a Section 21] which provided in part as follows:

> "1. (a) The Union and the Employer agree that there shall be no strike, lock-out-tie-up, work stoppage, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise. Should any dispute or grievance arise between the Employer and the Union, as to the meaning, import and application of, or compliance with the provisions of this Agreement, or should any grievance or dispute arise as between the Employer and Union, such dispute or grievance shall be settled in the follow-

ing manner: . . . ." (Specific procedural provisions of this section are contained in Exhibit 6 before the Court.)

16. That the defendants John Moran (hereinafter respectfully referred to as "Moran") and Michael Hunt (hereinafter respectfully referred to as "Hunt"), shop stewards of the defendant Local Union, were fired on April 22, 1971.

17. That at the time of the events described in paragraph 16, the grievance and arbitration procedure referred to in paragraph 15 and as contained at length in Exhibit 6 before the Court was available.

18. That the plaintiff, Emery, was willing to submit to arbitration and grievance the question of the firing of the defendants Moran and Hunt, and did in fact offer to do so on several occasions.

19. That the defendant Local Union did refuse to submit the question of the firing of the defendants Hunt and Moran to arbitration and grievance.

20. That on April 22, 1971, at 11:45 a.m., the employees of the plaintiff, Emery, who are members of Local Union, at the direction of the said union went out on strike.

21. That a collective-bargaining agreement also existed between the plaintiff, Emery, and Local Union covering the employees of the plaintiff, Emery, who are employed in various clerical positions.

22. That in addition on April 22, 1971, at 11:45 a.m., the employees of Emery who are members of Local Union and employed under the provisions of a collective-bargaining agreement concerning clerical employees at the direction of the said Local Union also went out on strike.

Appendix B

23. The collective-bargaining agreements concerning both the truck drivers, helpers, and platform men, and also the agreement concerning clerical employees of Emery were ratified by the members of Local Union.

24. That the members of the defendant Local Union engaged in picketing the premises of the plaintiff, Emery, at first carrying signs which read "on strike". Subsequently the members of the defendant Local Union so picketing ceased carrying "on strike" signs but continued to picket carrying signs which read "unfair labor".

25. Unless the defendant Local Union is enjoined and restrained from continuing to engage in the strike, picketing, and work stoppage, it may be reasonably expected that the plaintiff, Emery, will suffer substantial and serious loss of business and customer patronage to plaintiff's substantial and irreparable injury and damage in excess of such damage as plaintiff has already suffered, and greater injury will be inflicted upon the plaintiff, Emery, by the denial of relief than will be inflicted upon the defendants by the grainting of such relief.

26. It is impossible for plaintiff to ascertain the exact amount of damage and injury it will sustain in excess of $66,000.00 a day if the defendant Local Union and its members are not enjoined from committing such acts: The plaintiff, Emery, has no adequate remedy at law.

CONCLUSIONS OF LAW

1. The plaintiff and the defendant Local Union are parties to a valid existing collective-bargaining agreement, in writing, effective through November 30, 1973, which by its terms requires that any and all matters of controversy, dispute or disagreement of any kind or character existing between the parties and arising out of or in any way in-

volving the interpretation or application of the terms of said collective-bargaining agreement shall be submitted to arbitration for final and binding determination of the merits of such controversy, dispute or disagreement, and which collective-bargaining agreement further provides that defendant and its members shall not engage in any strike, cessation or stoppage of work, or picketing by reason of any matter subject to the arbitration procedure of the collective-bargaining agreement.

2. The defendant Local Union and members of defendant Local Union employed by plaintiff, engaged in a strike and work stoppage commencing on April 22, 1971, at 11:45 a.m., in substantial and material breach and violation of the contract between plaintiff and defendant Local Union.

3. Plaintiff has no plain, speedy or adequate remedy at law.

4. The Court has jurisdiction over plaintiff's cause and the relief sought thereunder by plaintiff under the provisions of Title 29, United States Code, Section 185.

5. Plaintiff's motion and application for injunction enjoining and restraining the defendant Local Union and its members from engaging in a strike, picketing and work stoppage at the plaintiff's premises located at 182-16 149th Road, Jamaica, New York 11432; 510 West 38th Street, New York, New York; 301 East 49th Street, New York, New York; 7 Nursery Lane, Rye, New York; Cargo Building # 88, John F. Kennedy International Airport, Jamaica, New York, must be granted.

Dated: New York, New York
June 11, 1971

WALTER BRUCHHAUSEN
U. S. D. J.

Appendix B

(Preliminary Injunction)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

This cause came on to be heard on the motion of the plaintiff for a preliminary injunction as evidenced by the Order to Show Cause and Temporary Restraining Order signed by Judge Mishler on April 22, 1971, which was served upon the defendants.

The Court having considered said Order to Show Cause and Temporary Restraining Order signed by Judge Mishler April 22, 1971, for a preliminary injunction; the verified complaint dated April 22, 1971; the Order to Show Cause dated April 24, 1971, signed by Judge Jack B. Weinstein, seeking to adjudge defendants in contempt of this Court; the Affidavits of Robert D. Foglia, Esq., and James B. Brown dated April 22, 1971, in support thereof; the Order to Show Cause dated April 23, 1971, signed by Judge Mishler, seeking to vacate the Temporary Restraining Order; the Order of Judge Walter Bruchhausen dated April 26, 1971, continuing the Temporary Restraining Order and directing the picketing to cease; the final order upon Contempt Proceedings dated April 27, 1971, signed by Judge Walter Bruchhausen; Order to Show Cause to vacate Temporary Restraining Order dated April 23, 1971; and the Order of Judge Walter Bruchhausen continuing the Temporary Restraining Order in full force and effect dated April 26, 1971; the evidence introduced at the hearing of said motion by the parties hereto, and has separately made findings of fact and conclusions of law with respect thereto.

Appendix B

Upon such findings of fact and conclusions of law, and if further appearing that plaintiff has given security, as fixed by the Court, in the sum of $1,000.00 it is hereby

ORDERED that the defendants, their agents, servants, employees, and all persons in active concert and participation with them pending the final hearing and determination of this action from:

(A) Engaging in any strike, concerted work stoppage, or tie-up at or about the premises of the plaintiff located at 182-16 149th Road, Jamaica, New York 11432; 510 West 38th Street, New York, New York; 301 East 49th Street, New York, New York; 7 Nursery Lane, Rye, New York; Cargo Building #88, John F. Kennedy International Airport, Jamaica, New York; and all other buildings and offices maintained by the plaintiff for use in conducting its air-freight business within the jurisdiction of this Court.

(B) From interfering with or impeding the loading or unloading of any cargo from any vehicle entering upon or adjacent to the plaintiff's premises located at 182-16 149th Road, Jamaica, New York 11432; 510 West 38th Street, New York, New York; 301 East 49th Street, New York, New York; 7 Nursery Lane, Rye, New York; Cargo Building #88, John F. Kennedy International Airport, Jamaica, New York; and all other buildings and offices maintained by the plaintiff for use in conducting its air-freight business within the jurisdiction of this Court.

(C) From interfering with or impeding the movement or handling of any cargo in the premises of the plaintiff located at 182-16 149th Road, Jamaica, New York 11432; 510 West 38th Street, New York, New York; 301 East 49th Street, New York, New York; 7 Nursery Lane, Rye, New York; Cargo Building #88, John F. Kennedy International Airport, Jamaica, New York; and all other buildings and offices maintained by the plaintiff for use in conducting its air-freight business within the jurisdiction of this Court.

(D) From interfering with or impeding the processing of bills of lading, airway freight bills, and similar documents at the premises of the plaintiff located at 182-16 149th Road, Jamaica, New York 11432; 510 West 38th Street, New York, New York; 301 East 49th Street, New York, New York; 7 Nursery Lane, Rye, New York; Cargo Building #88, John F. Kennedy International Airport; and all other buildings and offices maintained by the plaintiff for use in conducting its air-freight business within the jurisdiction of this Court.

(E) From stopping or interfering with the movement of any of the plaintiff's vehicles or vehicles carrying cargo entrusted to the plaintiff for transportation.

(F) From blocking, obstructing or impeding the ingress or egress of motor vehicles to and from the plaintiff's premises at 182-16 149th Road, Jamaica, New York 11432; 510 West 38th Street, New York, New York; 301 East 49th Street, New York, New York; 7 Nursery Lane, Rye, New York; Cargo Building #88, John F. Kennedy International Airport, Jamaica, New York; and all other buildings and offices maintained by the plaintiff for use in conducting its air-freight business within the jurisdiction of this Court.

Dated: New York, New York
June 22, 1971

(s) WALTER BRUCHHAUSEN
U. S. D. J.

APPENDIX C

(Opinion and Judgment of United States Court of Appeals for the Second Circuit)

(Opinion)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1098, 1099—September Term, 1970.

(Argued August 11, 1971 Decided September 24, 1971.)

Docket Nos. 71-1561, 71-1621

EMERY AIR FREIGHT CORPORATION,

Plaintiff-Appellee,

against

LOCAL UNION 295, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and JAMES COSTA, President, HARRY DAVIDOFF, Secretary-Treasurer, and JOHN MORAN and MICHAEL HUNT, Shop Stewards of Local 295,

Defendants-Appellants.

Before:

FEINBERG, MULLIGAN and TIMBERS,

Circuit Judges.

Appeals from order granting preliminary injunction against local union and local's president, secretary-treasurer and shop stewards and from order of civil contempt imposing fine of $50,000 against local union and two shop stewards, in the United States District Court for the

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Eastern District of New York, Walter Bruchhausen, *J.* Reversed and remanded.

DAVID SCRIBNER, New York, N. Y. (Herbert A. Simon, Valley Stream, N. Y. on the brief), *for Defendants-Appellants.*

ROBERT D. FOGLIA, New York, N. Y. (Howard Franklin Cerny, on the brief), *for Plaintiff-Appellee.*

FEINBERG, *Circuit Judge*:

Local Union 295 and its officers[1] appeal from various orders of the United States District Court for the Eastern District of New York, Walter Bruchhausen, *J.*, which prohibit appellant from engaging in a strike and fine some of them $50,000 for contempt. The appeals arise out of a labor dispute between the Local and plaintiff-appellee Emery Air Freight Corporation. We conclude, first, that the court below lacked jurisdiction under the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, to order a preliminary injunction in this controversy and, accordingly, we reverse that order. Second because the order holding appellants in contempt was entered without a proper hearing, we remand that issue to the district court for reconsideration. The case illustrates that haste in court often makes waste, particularly in the heated and urgent atmosphere that so frequently characterizes labor disputes that culminate in a strike. *Cf. New York Telephone Co.* v. *Communications Workers of America*, — F.2d — (2d Cir. 1971).

The controversy arises out of the negotiations between Emery and Local 295 for a new collective bargaining

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[1] The Local is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

agreement covering outside employees (truck drivers, helpers and platform men). Local 295 represents various workers in the air freight industry, including those employed by Emery. Local 295 and Emery have had an established collective bargaining relationship for many years, and in the past the agreements with Emery have been the same as those reached with other employers. Indeed, the agreements in the industry have apparently been uniform. Emery's last "outside contract" with Local 295 ran from November 30, 1967 to December 1, 1970, and contained a broad arbitration clause and a commitment by the parties not to strike or lock-out before exhausting the arbitration procedure. Negotiations for a new agreement began before the expiration date. In mid-December 1970, there was apparent agreement on basic economic terms, which were incorporated into a two-page supplemented agreement. The parties are in dispute over whether this document, together with the prior (1967-1970) contract, is the entire final agreement of the parties. Emery says that it is. Local 295 denies this. It claims that the parties had reached a basic understanding only on economic issues and that further negotiations were to come regarding language and non-economic provisions, including the grievance procedure which had been a source of trouble in the past between Emery and Local 295.

In any event, the new economic provisions were put into effect immediately and a few months later, Local 295 provided Emery with a complete printed final form of the agreement. Emery refused to sign it, claiming that it did not reflect the agreement of the parties. At a meeting on April 22 between the parties, Local 295 representatives pointed out that the contract in the printed form was being signed by other employers in the industry, of whom there were about 60, and threatened an immediate strike if Emery did not follow suit. The discussion degenerated into an impasse, and Local 295 called a strike. The parties con-

tinued to talk for a while on April 22 and apparently came close to, but did not achieve, agreement.

And so this litigation began. That same evening attorneys for Emery appeared before Chief Judge Mishler of the Eastern District and obtained a temporary restraining order enjoining defendants-appellants from engaging in a strike. The order referred to a verified complaint attached thereto, which alleged an action under section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, for damages and preliminary and permanent injunctive relief for alleged violations of the no-strike clause of a collective bargaining agreement between Emery and Local 295.

I

Before recounting the events of the hectic next few days in this litigation, it is helpful to pause to examine the current vitality of some of the provisions of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, since appellants rely upon that Act heavily. Only a few months ago, in *New York Telephone Co., supra*, we had occasion to scrutinize the Act. We pointed out, — F.2d at —, that the "generality" of injunctions issued in labor disputes had been "one of the chief abuses that led to the Norris-LaGuardia Act." We emphasized that the Act still applies to all labor disputes in which a federal court can issue an injunction, that nothing in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), is to the contrary, and that although that decision allows an employer injunctive relief in a labor dispute, such relief is "limited to vindicating the arbitration process. *See* Note, 71 Colum. L. Rev. 336, 342-44 (1971)." *Id.* Thus, before an employer in a dispute with a union can obtain an injunction, there are a number of conditions to be satisfied. Section 7 of the Act, 29 U.S.C. § 107, lists a good many of them, in-

cluding the requirements that a temporary restraining order "shall be effective for no longer than five days" and that such an order should not be issued except upon "testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice," and upon the condition that:

> [C]omplainant shall first file an undertaking with adequate security . . . to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such . . . injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

Section 8 of the Act, 29 U.S.C. § 108, requires a showing by the complainant that he has made "every reasonable effort to settle" the dispute. Section 9, 29 U.S.C. § 109, limits the restraints of a temporary restraining order to those "specific acts . . . expressly complained of in the . . . complaint."

Similarly, in *Boys Markets*, the Court emphasized the conditions precedent to obtaining an injunction in a labor dispute. In overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), the Court held that a strike may be enjoined only in carefully defined circumstances. It emphasized, 398 U.S. at 253-54:

> Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act. We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure. Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable

grievance." The dissenting opinion in *Sinclair* [370 U.S. at 228] suggested the following principles for the guidance of district courts in determining whether to grant injunctive relief—principles we now adopt:

> "A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. . . ." (Emphasis in original.)

Thus, as we pointed out in *New York Telephone Co., supra*, — F.2d at —, in order to enjoin a labor dispute, the court must find that both parties are required to arbitrate the dispute and the employer should be so ordered as a condition to such relief.

II

With this background in mind, we return to the chronicle of what transpired in the district court. The temporary restraining order already referred to was signed on April 22 at 10:30 at night without notice to defendants or a hearing. It purported to be effective until May 3, 1971, unless extended, did not order arbitration of any underlying dispute or condition employer relief upon its occurrence, and required plaintiff to file a bond of $1,000. On Friday, April

23, the restraining order was served upon the Local union and two of the four individual defendants. On the same day, defendants obtained an order to show cause, signed by Judge Mishler and returnable on Monday, April 26 at 10:00 a.m., why the temporary restraining order of April 22 should not be vacated. On Saturday, April 24, Emery obtained an order to show cause, signed by Judge Weinstein, also returnable on April 26, why defendants should not be held in contempt for failing to obey the April 22 temporary restraining order. The affidavits in support of the application alleged that Emery would suffer more than $60,000 loss each day the strike continued.

On the morning of April 26, the parties appeared before Judge Bruchhausen, and argument centered primarily on defendants' motion to vacate the April 22 temporary restraining order. Defendants claimed repeatedly that the order had been signed without compliance with the requirements of either the Norris-LaGuardia Act or the *Boys Markets* decision. At the argument, it became apparent that the situation had been complicated by Emery's discharge of shop stewards Moran and Hunt, defendants in this action. At 4:00 p.m. on April 26, Judge Bruchhausen issued a brief memorandum order, the full text of which was the following:

> Upon due deliberation, it is ordered that the temporary restraining order herein be and same hereby is continued in full force and effect and that the contempt issue will be considered at the appropriate time and it is further ordered that the defendants forthwith direct the picketing to cease and the pickets cease and desist from picketing.

Later on April 26 the court filed a second memorandum and order, which confirmed its earlier order of that day. In a three-page opinion, Judge Bruchhausen found that plaintiff's action pertained to a labor dispute, that plaintiff was

engaged in substantial air freight shipments, and that the essential dispute between the parties was whether there was a new, agreed-upon contract. However, the judge emphasized that Emery's employees had been receiving economic benefits pursuant to the supplemental agreements which defendants claimed was not a binding contract. Finally, the judge stated that:

> [T]he temporary restraining order is and was warranted, despite the provisions of the Norris-LaGuardia Act. The Court has followed the guidelines as enunciated in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 at 254, in determining to grant such relief.

Up to this point apparently there had been no full hearing upon Emery's application to hold appellants in contempt of the April 23 temporary restraining order, and there had been no resolution of that motion. The continuation of the restraining order issued at 4:00 p.m. on April 26 contained no time limitations and again did not order arbitration of any underlying dispute as a condition of granting injunctive relief to Emery. The confirming opinion issued later in the day did take note of *Boys Markets*, as just indicated, but did not order arbitration.

A copy of the shorter order to April 26 was served upon Local 295 and upon defendant Hunt the same evening. However, the men did not come back to work or cease picketing. During the remainder of April 26 and the morning of April 27, attempts continued to resolve the underlying dispute between the parties. Apparently at the suggestion of counsel for appellants, there was a conference before Judge Bruchhausen at about noon on April 27. On the same day, Judge Bruchhausen signed a so-called Final Order upon Contempt Proceedings, which held Local Union 295, Hunt and Moran in contempt of court for having dis-

obeyed the April 22 and April 26 orders and fined them the sum of $50,000 for the contempt, to be paid to Emery.

On the morning of April 28 there was a hearing before Judge Bruchhausen. Counsel for Emery argued that defendants were still disobeying the various orders already entered, and asked that the fine previously imposed be set on a daily basis. Counsel for appellants stated that there had to be a hearing if there was any application for contempt. The court indicated that the hearing had already been held but would have a further hearing that afternoon. Counsel for appellants protested that he needed more time to prepare for it and suggested that the hearing be held two days later on April 30. This request was denied.

A hearing was held the afternoon of April 28, and various witnesses testified on behalf of Emery. Counsel for appellants stated that he was unable to participate because of his lack of opportunity to prepare and did not cross-examine any witnesses. At the close of the hearing, the court reserved judgment, pending a further report the following morning, upon Emery's request for immediate payment of the fine already imposed and for imposition of a daily fine in the amount of $66,000. On the morning of April 29, counsel for Emery reported that a great majority of its employees had returned to work and the court directed that the "fine of $50,000 and interest from April 27, 1971 will stand. . . ."

The next day, a full hearing was held upon Emery's application for a preliminary injunction, at the conclusion of which the court indicated that an injunction would issue. On June 11, 1971, the judge filed findings of fact and conclusions of law, and on June 22, signed a preliminary injunction. The judge found that the parties had entered into a new collective bargaining agreement about December 15, 1970, as Emery had claimed, that the agreement contained a no-strike clause, and that the dispute over the firing of shop stewards Morain and Hunt could have been submitted

to arbitration, but defendants refused to do so. The preliminary injunction continued the prior restraints on defendants, but did not order arbitration.

On April 30, appellants filed a notice of appeal from the April 22 temporary restraining order, from the April 26 continuation of the temporary restraining order and denial of defendants' motion to vacate the earlier order, and from the Final Order Upon Contempt Proceedings dated April 27, 1971. On June 22, 1971, appellants filed a notice of appeal from the preliminary injunction.

III

We thus come, finally, to the merits of the appeal. We note in passing that whatever questions of appellate jurisdiction there might have been in an appeal from only the April 22 and April 26 orders and the April 27 Final Contempt Order, *cf. New York Telephone Co. v. Communications Workers of America, supra*, — F.2d at —, since the appeal from the June 22 preliminary injunction is clearly proper, 28 U.S.C. § 1292(a), we will consider the merits of the various orders.

Turning to the June 22 preliminary injunction first, we do not see how it can stand under the governing law. It is quite clear that the major dispute between the parties was whether a new contract existed. It was precisely this dispute which led to the impasse in negotiations and to the original call to strike on Thursday, April 22. Indeed, the trial court recognized this in its April 26 opinion. This dispute was not arbitrable because Emery and Local 295 had never agreed to make it so. Emery does not claim that this was an arbitrable question and the trial court did not so find. That the issue whether a new contract existed was decided by the court on June 14, after the evidentiary hearing of April 30, if anything, shows that no

one regarded that issue as arbitrable. Therefore, under the Norris-LaGuardia Act, and the *Boys Markets* reading of it, the preliminary injunction was improper because the "'strike . . . sought to be enjoined . . . [was not] over a grievance which both parties are contractually bound to arbitrate.'" 398 U.S. at 254, citing *Sinclair Refining Co. v. Atkinson*, 370 U.S. at 228 (dissenting opinion). *Cf. Standard Food Product Corp. v. Brandenburg*, 436 F.2d 964 (2d Cir. 1970); see Isaacson and Burke, A Fresh Look at the Labor Injunction, 43 N.Y.S.B.J. 243, 250 (1971). It is true that the subsidiary dispute over the firing of Hunt and Moran was arbitrable, once the court found that there was a new contract in effect which contained an arbitration clause. But the preliminary injunction was not limited to that dispute, and arbitration of even that lesser issue was not ordered, contrary to *Boys Markets*. Accordingly, the preliminary injunction as granted was improper. However, this conclusion does not dispose of the question of contempt, to which we now turn.

The Final Order Upon Contempt Proceedings, dated April 27, 1971, was based upon the conclusion of the district court that Local 295 deliberately refused to obey the court's temporary restraining orders of April 22 and April 26. Although for reasons given below the record on that issue is unsatisfactory, Emery did provide on April 28 a good deal of evidence to justify the court's conclusion. If defiance of the orders of April 22 and April 26 is what occurred, we cannot condone it even if the orders were improper. That the orders contained defects, however, seems clear. The April 22 and April 26 temporary restraining orders did not require arbitration as *Boys Markets* teaches. Contrary to the requirements of the Norris-LaGuardia Act, the restraints were not limited to five days. The nominal bond of $1,000 required of Emery was hardly adequate under the Act's standards. Also, the orders were issued upon

affidavits rather than "upon testimony under oath."[2] 29 U.S.C. § 107. Apart from procedures required for labor disputes, Fed. R. Civ. P. 65(b)(2) states that a temporary restraining order may be granted "only if . . . the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required." No such certification or statement of reasons appeared in the application for the April 22 order, which was granted without formal notice. In addition, this court has carried the spirit of Rule 65 further and frowned upon temporary restraining orders issued without even telephoned notice. See *Austin* v. *Altman*, 332 F.2d 273, 275 (2d Cir. 1964); *Arcida Corp.* v. *Sugarman*, 259 F.2d 428 (2d Cir. 1958).

Thus, the April 22 and April 26 temporary restraining orders were deficient in numerous respects and were improperly entered. But that they could therefore be disregarded by no means follows. As we noted by way of dictum in *New York Telephone Co., supra*, — F.2d at —, "Generally, injunctions and restraining orders must be obeyed until overturned, and failure to do so is punishable as contempt even though the order is later overturned," citing *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967), and *United States* v. *United Mine Workers*, 330 U.S. 258 (1947). However, appellants argue that the contempt found here was civil rather than criminal and

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[2] Section 107 apparently contemplates oral testimony as a prerequisite for the issuance of restraining orders. See, e.g., 75 Cong. Rec. 4508 (1932) (remarks of Senator Norris); M. Forkosch, A Treatise on Labor Law § 212 n.64 (2d ed. 1965); *cf. Piedmont Aviation Inc.* v. *Air Line Pilots Ass'n, Internat'l*, 416 F.2d 633, 637 n.7 (4th Cir. 1969). We need not consider those situations in which the claim may be made that the taking of such testimony is impossible and affidavits must be relied upon; the district court made no such finding here.

that *United Mine Workers*, 330 U.S. at 294-95, makes clear that such contempt judgments should be set aside when the order upon which they are based is held on appeal to have been erroneously entered. Moreover, citing *In re Green*, 369 U.S. 689 (1962), appellants argue that whatever may be the general rule, the Court has made clear since *United Mine Workers* that if a court is "without jurisdiction" to enter a restraining order, the order is void and violations may not be punished even as a criminal contempt.[3] Since compliance with the Norris-LaGuardia Act is a "jurisdictional" requirement, say appellants, the district court had no "jurisdiction" to enter the orders they allegedly ignored and, therefore, the contempt must be set aside. The questions raised by appellants and by the above-cited cases are substantial.[4] However, we need not decide these delicate issues because we conclude that the finding of contempt in the Final Contempt Order and the $50,000 fine were both imposed without proper regard for defendants' procedural rights and therefore must be set aside and reconsidered.

The Final Contempt Order was signed on April 27. It will be recalled that the parties appeared before Judge Bruchhausen on April 26, but the argument at that time focused on Local 295's motion to vacate the earlier temporary restraining order rather than on Emery's motion to hold defendants in contempt. The judge stated in his brief memorandum after the argument that "the contempt issue will be considered at the appropriate time," a clear indication that it had not been considered as yet. There was no

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[3] As will be seen below, defendants also argued to the district court that they were "perhaps" entitled to "even a jury trial" at a contempt hearing. See 18 U.S.C. § 3692.

[4] See C. Wright, Law of Federal Courts § 16 (2d ed. 1970); James, Book Review, 78 Harv. L. Rev. 1296, 1298 (1965); Tefft, Neither Above the Law nor Below It: A Note on *Walker* v. *Birmingham*, 1967 Sup. Ct. Rev. 181, 189-91 (1967); Cox, The Void Order and The Duty To Obey, 16 U. of Chi. L. Rev. 86 (1948).

formal hearing after that until April 28, one day *after* the Final Contempt Order was signed. It is true that the parties appeared before the judge at noon on April 27. This conference was arranged informally on no papers, was not a continuation of the hearing held on April 26, and there was no record of the proceeding. However, Judge Bruchhausen on April 28 summarized what had occurred before him on April 27. On that day, apparently, the lawyers reported to the judge that the strike was continuing because Emery refused to assign work to the two "discharged" shop stewards, and the judge thereupon read to the lawyers his "formal opinion," the three-page memorandum of April 26, which continued the temporary restraining order and made some findings about the nature of the dispute. According to the judge's summary:

> After hearing the attorneys (on April 27),[5] I made the statement that unless the men returned to work forthwith, there would be a fine assessed at $50,000.

The judge then (on April 28) asked for comments by the attorneys on his summary of what had occurred. In the ensuing colloquy, counsel for Emery reported extensively on the union's "token compliance" with the prior orders of the court, emphasized Emery's continuing damages of over $60,000 each day, and made clear that he had witnesses ready to testify to support that figure. Counsel for Local 295 then stated:

> "Judge, at the outset, concerning your commentary regarding yesterday's events, I would point out that I came to this court for the purpose, in effect, to ask for a modification of the order whereby there can be a return to work based upon the principle. . . .

[5] The transcript (p. 4) uses the date of April 22, and obvious error.

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After some further discussion of various issues, including whether the men were actually going back to work, the following ensued:

> Mr. Simon (counsel for Local 295): Judge, I hear these things for the first time. I have not been served with papers. In fact, I didn't know why I was coming here this morning.
>
> Mr. Foglia (counsel for Emery): That likewise is inaccurate. When I served Mr. Simon I advised Mr. Simon that I would expect the people to be back at work forthwith.
>
> I further advised Mr. Simon that in the event the people were not back forthwith, I intended to appear in court the first thing this morning and make an application before this court, so Mr. Simon is totally conversant with the reasons why he is here.
>
> Mr. Simon: No, I mean as far as I know the people went back to work this morning. This was my information.
>
> The Court: This report doesn't indicate it.
>
> Mr. Simon: That is not a sworn report or anything. I don't think—I think—
>
> The Court: You want a sworn document.
>
> Mr. Simon: *I think we have to have a hearing. Is this application for a contempt?*
>
> Mr. Foglia: *The contempt has been granted.*
>
> The Court: *This is certainly along that line.*
>
> Mr. Simon: Norris-LaGuardia, you remember, stated in your opinion, is labor. Norris-LaGuardia covers labor and contempt.
>
> We should have a hearing with witnesses and perhaps even a jury trial.
>
> Mr. Foglia: You know a jury trial is certainly not an issue. The Court has ruled. We also have

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Rose Mairzes. It indicates injunctive relief if available under these circumstances, as a matter of fact.

The Court: Well, we had a hearing on this and certainly those interest defendants should have been here. They knew and were informed by the order of the Court what was going on.

Mr. Simon: There was a motion to vacate the restraining order. That was on behalf of the union, and I appeared on behalf of the union. I don't know what the services were on the other defendants. I don't appear for the other defendants.

Mr. Foglia: Counsel would appear to overlook the fact that in addition to the motion made by counsel we made a motion for contempt, and a copy of that order was served personally on Mr. Simon by myself.

So Mr. Simon was totally conversant for the reason on the present entire occasion and I assume he likewise advised his client that the contempt was on.

The Court: I am considering having a hearing very shortly, so I would fix a hearing for 2:15.

Mr. Simon: May I have additional time with regard to a hearing? I want to prepare for such a hearing. I have not been served with any papers in this matter. I think I am entitled to due notice and some kind of papers, pursuant to which I can act readily to prepare an answer relating to same.

This has been an oral application as to which I hardly had any notice, as to which I am quite certain that with additional time I can find factors which—

The Court: As far as notice, you had a notice of motion for contempt.

Mr. Simon: The original notice upon which you have issued an order

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The Court: That is an application for contempt, and no suggestion was made about a hearing on that contempt motion at all, even when I made the order and it found so forth and so on, I don't think your position is sound.

Mr. Simon: *I am sorry, sir, I take the position that we were required to have a hearing because certainly these are very serious matters.*

The Court: There is no request for a hearing at all. This is the first time after all these meetings and conferences, the directions and orders of the Court that any suggestion has been made about a hearing.

Mr. Foglia: Your Honor, I urge the Court that the hearing be held at 2:30, because of the economic loss mounting each hour.

The Court: I think that it is a frightful situation, and under these circumstances we have to have our movement accordingly.

Mr. Simon: Your Honor, you recommended a radio announcement earlier, and I would say to you that I am prepared to arrange for such a radio announcement and I further—but I also want to have the hearing on the contempt, but I need time to prepare.

We were supposed to be returned hereon the 24th. I would request that we go to the 30th on the contempt.

The Court: I can't go along with you. This delay is just unbearable.

Mr. Simon: I am sorry, sir. We have been doing all we can.

The Court: This has been noticed and they have not responded except by token performance or no performance at all. I can't conceive I have any

Mr. Fogia: Thank you, your Honor.

The Court: I'll fix a hearing for 2:15 p.m.

Mr. Simon: I must take exception. [Emphasis added.]

hearing was held at 2:15 on April 28, at which Emery
nted various fitnesses to prove that Local 295 and
ficers had not been complying with the court's orders
pril 22 and 26. Counsel for defendants refused to
nt evidence or to cross-examine, claiming insufficient
to prepare. At the end of the hearing, Emery moved

the payment of the fine that you indicated yesterday in court and I ask that the same be paid to this court in favor of the Emery Air Freight forthwith and that the Court fix a daily damage in the sum of $66,000 commencing April 22, running to the current date.

judge reserved decision on the request for additional fines of $66,000, but stated that "Of course the 00 stands."

he following morning, April 29, the judge heard the
's further as to the current status of the strike.
being informed that most of the men had returned
rk, the judge refused to grant the additional fines
sted by Emery and stated that:

I am certainly mindful of the stress and strain that the plaintiff has undergone here, and certainly unjustifiably on the part of the defendants. But the indication here is that the defendants are, to the extent, endeavoring to cure the fault, so under all the circumstances, the fine of $50,000 and interest from April 27, 1971, will stand, and I shall adjourn this matter without date and the plaintiff will have the opportunity at any time to move for further relief.

On the next day, April 30, a full hearing was held in the application for a preliminary injunction, which we have already discussed.

Thus, it is quite clear that the April 27 Final Contempt Order was the product of a rushed series of legal maneuvers by the parties, compounded by the exigencies of a strike, which led the court into unintentionally denying to the defendants their right to a hearing. *In re Green*, 369 U.S. 689 (1962). There was no real hearing before the April 27 order was signed. The judge apparently thought that the conference before him at noon on April 27 was a hearing on the application to hold defendants in contempt. But the attorney for Local 295 justifiably did not so regard it, since he had apparently informally initiated the conference, no papers called for such a hearing, no record was made of the proceedings, and no evidence was presented. Yet, the judge stated at that April 27 conference that unless the men returned to work forthwith, a fine of $50,000 would be assessed, which was done on April 27, and adhered to on April 28. Therefore, the critical decisions as to whether defendants were in contempt and, if so, what the sanction should be were made in an ambiguous procedural setting, and on an inadequate record. Such important questions cannot be decided in that manner, and the Final Contempt Order cannot stand. Nor can the evidence adduced at the April 28 or the April 30 hearing retroactively validate that order because the initial impact of the decision to fine defendants $50,000 obviously continued to influence the judge when he adhered to it. *See In re Oliver*, 333 U.S. 257, 284-85 (1948)* (concurring opinion).* Since that original determination was made improperly, it must be set aside.

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* Mr. Justice Frankfurter stated:

> [A]n opportunity to meet a charge of criminal contempt must be a fair opportunity. It would not be fair, if in the court in which the accused can contest for the first time the validity of the charge against him, he comes handicapped with a finding against

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We do not suggest that appellants are hereby immunized from a finding of contempt or that their pattern of conduct, if a fuller record discloses it to be as egregious as it now appears, should be disregarded or encouraged. All that we hold is that the Final Contempt Order must be set aside, subject to whatever further proceedings as to contempt the parties request and the district court finds appropriate. At such proceedings, the court should consider, *inter alia*, the basic questions raised by appellants and alluded to above.

Preliminary injunction and contempt order reversed and case remanded for further proceedings consistent with this opinion.

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(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of September, one thousand nine hundred and seventy-one.

Present:

HON. WILFRED FEINBERG,

HON. WILLIAM H. MULLIGAN,

HON. WILLIAM H. TIMBERS,

Circuit Judges.

EMERY AIR FREIGHT CORPORATION,

Plaintiff-Appellee,

v.

LOCAL UNION 295, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and JAMES COSTA, President, and HARRY DAVIDOFF, Secretary-Treasurer and JOHN MORAN and MICHAEL HUNT, Shop Stewards, of Local 295,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

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This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are reversed and that the action be and it hereby is remanded to said District Court for further proceedings consistent with the opinion of this court with costs to be taxed against the appellee.

A. Daniel Fusaro
Clerk

FILED
MAR 16 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1076

EMERY AIR FREIGHT CORPORATION,

Petitioner,

vs.

LOCAL UNION 295, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and JAMES COSTA, President, and HARRY DAVIDOFF, Secretary-Treasurer, and JOHN MORAN and MICHAEL HUNT, Shop Stewards of Local 295,

Respondents.

ON PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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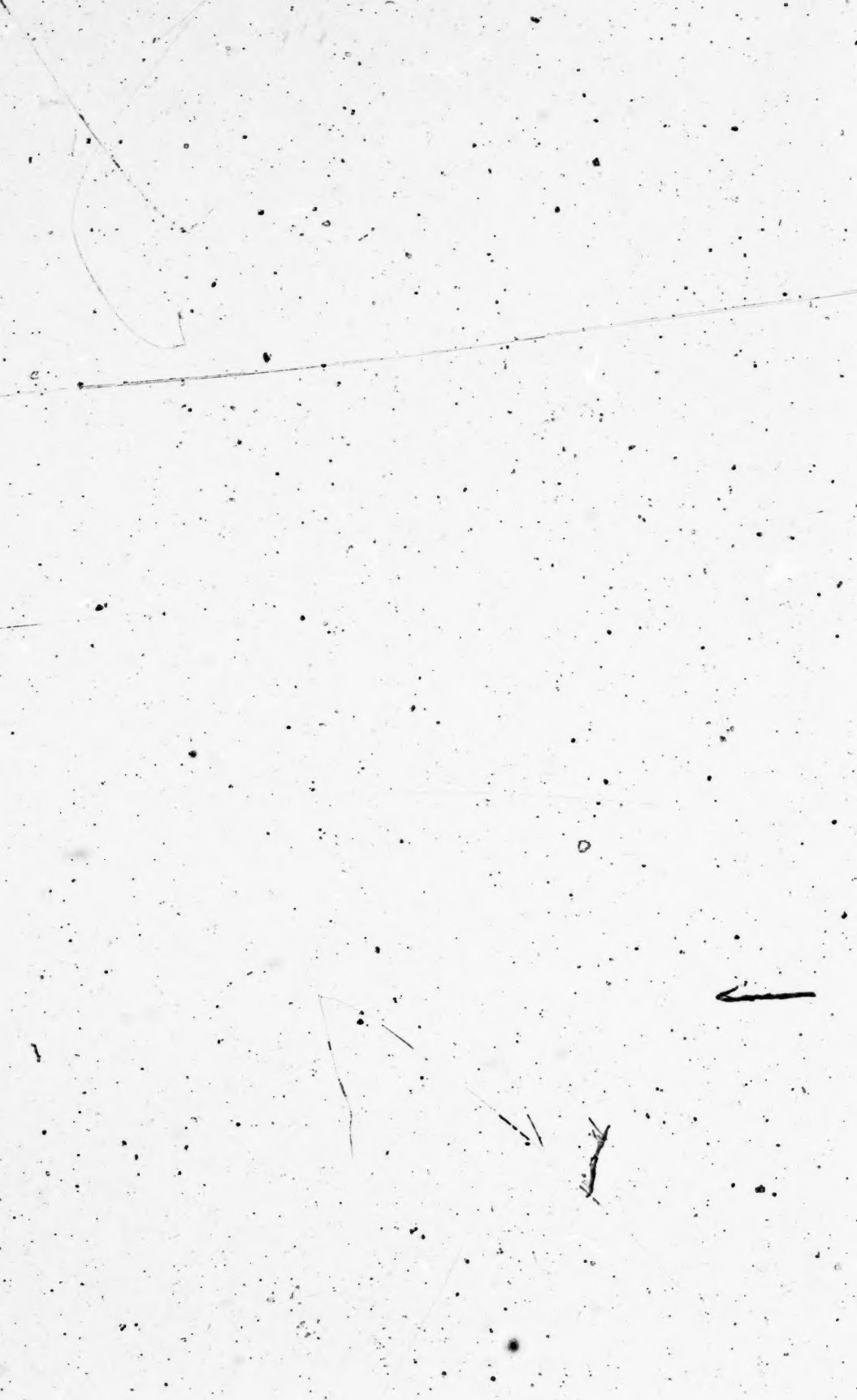

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1076

EMERY AIR FREIGHT CORPORATION,

Petitioner,

vs.

LOCAL UNION 295, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and JAMES COSTA, President, and HARRY DAVIDOFF, Secretary-Treasurer, and JOHN MORAN and MICHAEL HUNT, Shop Stewards of Local 295,

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ON PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The Findings of Fact, Conclusions of Law and Order Granting Preliminary Injunction of the United States District Court for the Eastern District of New York (Petition, pp. 5a-14a) were not officially reported. The opinion of the United States Court of Appeals for the Second Circuit (Petition, pp. 15a-34a)[1] is reported at 449 F.2d 586.

[1] References to the Court of Appeals opinion as reprinted in the Appendix to the petition will be abbreviated "C.A., p. ". Similarly, references to the Findings, Conclusions and Order of the District Court as reprinted in the Appendix to the petition will be abbreviated "D.C., p. ".

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

Whether, as concluded by the Court of Appeals, the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, prohibits a federal District Court from granting injunctive relief against a strike or work stoppage in a labor dispute where the issue, found by the Court to be nonarbitrable, is whether any collective bargaining agreement exists between the parties to the dispute.

Statutes Involved

Pertinent provisions of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §§ 151 *et seq.*, and of the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, are adequately set forth in the petition.

Statement of the Case

The petition in this case arises out of an action commenced, pursuant to Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, by petitioner, Emery Air Freight Corporation (hereinafter referred to as "Emery") seeking damages and injunctive relief for alleged violations of the no-strike clause of a collective bargaining agreement claimed by Emery to be in effect between it and Local Union 295, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Local 295").

The 1970 Contract Negotiations

Emery and Local 295 have had an established collective bargaining relationship for many years. As noted in the petition, Local 295 is the recognized collective bargaining representative of three units of Emery's employees in the New York metropolitan area, including a unit of Emery's truck drivers and platform men. Prior to commencement of the negotiations involved herein, Emery and Local 295 were parties to a collective bargaining agreement covering truck drivers, helpers and platform men which was effective from November 30, 1967 to December 1, 1970 (Record on Appeal, pp. 4a, 26a, 149a, 218a-219a).[2]

Throughout November and early December, 1970, the parties engaged in negotiations looking toward a new agreement covering drivers, helpers and platform men (R. 5a, 26a, 219a-234a). Local 295 represents employees of a number of employers in the air freight industry in addition to Emery and, in the past, the collective bargaining agreements which it has negotiated in the New York area have been uniform as to all the various employers (R. 35a). The negotiations with Emery were therefore coordinated with simultaneous negotiations with other air freight companies.

In December, 1970, representatives of Local 295 submitted to Emery a two-page "Supplemental Agreement" (R. 15a-16a) containing a number of basic proposed provisions relating to the economic aspects of the proposed new agreements and advised Emery that the document was being signed by other air freight employers (R. 5a, 26a, 228a-232a). After some delay, the document was executed

[2] References to the Record on Appeal will be abbreviated "R." followed by the page number or numbers.

by Emery and returned to the Union with the understanding that Local 295 would prepare a final agreement incorporating the provisions of this "Supplemental Agreement" (R. 228a-232a).

The Labor Dispute

The significance of this "Supplemental Agreement", executed in December, 1970, lies at the heart of the dispute which developed between Emery and Local 295. Emery took the position that the December agreement, together with the 1967-70 agreement, constituted the entire final agreement of the parties and that its execution represented the conclusion of negotiations (R. 65a). Local 295, on the other hand, has consistently taken the position that the December document was simply a basic understanding respecting economic issues with more negotiation still to come on contract language and other non-economic issues (R. 65a). One of the most important of these non-economic issues, from the point of view of Local 295, was clarification of the language respecting the grievance procedure, including the provisions concerning arbitration (R. 34a-36a, 65a).

In early April, 1971, Local 295 provided Emery with a complete printed final form of agreement (R. 5a-6a, 26a, 233a-234a, 249a). Representatives of Emery reviewed this form, concluded that, in their opinion, it did not accurately reflect the agreement of the parties, and requested a meeting with Local 295 negotiators (R. 6a, 27a-28a, 249a-250a). The meeting took place on April 22, 1971. At this meeting, Emery officials expressed their view that the document did not embody the agreement of the parties but, according to Company witnesses, Local 295 negotiators insisted that the

agreement was being signed in that form by the other employers and that, if Emery did not sign it, members of Local 295 would strike immediately (R. 7a, 28a, 38a-39a, 149a-151a, 248a, 251a-252a, 256a-257a, 287a-288a). Emery persisted in its refusal and, at approximately 11:45 a.m., the Union commenced its strike (*Id.*).

Proceedings in the District Court

Counsel for Emery immediately began preparation of the complaint, motion for temporary restraining order and supporting papers in this case (R. 297a). At approximately 10:30 p.m. on April 22nd, without notice to Local 295 or the individual defendants, counsel for Emery appeared before Judge Mishler of the Eastern District of New York, and obtained a temporary restraining order prohibiting the strike activity and setting the cause for hearing on Emery's request for preliminary injunction on April 30 (R. 22a-23a, 297a).[3] On that date, following a hectic flurry of court activity, including efforts by Local 295 to have the restraining order vacated and a contempt proceeding, the District Court granted a preliminary injunction banning further strike activity. The District Court's formal Findings of Fact and Conclusions of Law are dated June 11, 1971 and the injunction itself is dated June 22, 1971 (D.C., pp. 5a-14a).

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[3] The Court of Appeals, in its decision (C.A., pp. 25a-26a), called attention to numerous substantive and procedural defects in the restraining order including its failure to require arbitration, its failure to limit its restraint to a five-day period, the inadequacy of the bond required of Emery, the issuance of the order upon affidavits rather than upon oral testimony under oath, and the failure of Emery, in its moving papers, to certify its efforts to give notice.

Among the findings of fact of the District Court were findings that the parties had, contrary to the contention of Local 295, entered into a new collective bargaining agreement on or about December 15, 1970, and that the new agreement consisted of the 1967-70 agreement as modified by the December 1970 agreement (D.C., p. 7a). It was not alleged by Emery, and the District Court did not at any time hold, that the strike was over an arbitrable grievance, nor did it order arbitration as a condition to granting Emery the requested injunctive relief.

The Decision of the Court of Appeals

The Court of Appeals held that "the major dispute between the parties was whether a new contract existed" and that that dispute was not arbitrable (C.A., pp. 24a-25a). Relying on this Court's decision in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U.S. 235 (1970), the Court of Appeals reversed.

Reasons for Denying the Writ of Certiorari

It is conceded by Emery that this case arises out of a labor dispute, and the District Court itself specifically so held (R. 64a). That being true, the injunctive relief sought by Emery is barred by Section 4 of the Norris-LaGuardia Act, 29 U.S.C. §104, unless the case falls within the narrow exception to that section's otherwise absolute prohibition of injunctive relief in non-violent labor disputes established in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U.S. 235 (1970).

Prior to this Court's decision in *Boys Markets*, the law was settled that the anti-injunction provisions of Section 4 of the Norris-LaGuardia Act precluded federal courts from enjoining strikes even though assertedly in violation of a no-strike clause of a collective bargaining agreement which also provided for binding arbitration of the dispute concerning which the strike was called. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). In *Boys Markets*, the Court overruled *Sinclair*, holding that a federal court may enjoin strikes in certain circumstances which the Court was at pains to delineate and circumscribe:

> "Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act. We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure. Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance." (398 U.S. at 253-54).

The Court, adopting the view of the dissenting opinion in *Sinclair*, set out specific principles to guide lower federal courts in determining when equitable relief is appropriate:

> "A District Court entertaining an action under §301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to

> arbitrate, as a condition of his obtaining an injunction against the strike." 370 U.S. at 228, 8 L. ed. 2d at 460. (Emphasis in original). (398 U.S. at 254.)

Thus, the Court clearly held that injunctive relief is appropriate if, and only if, the dispute concerns a grievance subject to a mutually binding arbitration agreement, and, even then, only if the order granting the injunction also requires that both parties submit the matter to immediate arbitration.

The federal courts have had no difficulty in applying the clearly-stated standards of *Boys Markets*. Those courts, other than the District Court in this case, which have directly considered the question have uniformly held that the fundamental prerequisite in a §301 suit for anti-strike injunctive relief, is a finding that the strike is over an arbitrable dispute. See, *e.g.*, *Associated General Contractors* v. *Illinois Conference of Teamsters*, F.2d (7th Cir., Doc. No. 18729, January 31, 1972); *United States Steel Corp.* v. *United Mine Workers*, F.2d (3d Cir. Doc. Nos. 19,454-19,481, February 3, 1972); *New York Telephone Co.* v. *Communications Workers of America*, 445 F.2d 39, 51 (2d Cir. 1971); *Standard Foods Corp.* v. *Brandenburg*, 436 F.2d 964 (2d Cir. 1970); *Simplex Wire and Cable Co.* v. *Local 2205, IBEW*, 314 F. Supp. 885 (D.N.H. 1970).

Both the District Court (R. 64a-65a) and the Court of Appeals (C.A., p. 24a) recognized that the essential dispute between the parties was whether a new contract did or did not exist. That conclusion is inescapable upon this record and Emery does not challenge it in its petition. The District Court, though it professed to be following the guidelines of *Boys Markets* (R. 65a-66a), never made any finding as to

whether that dispute is an arbitrable one. The Court of Appeals specifically held that it is not arbitrable (C.A., pp. 24a-25a).

The power of an arbitrator to render a binding decision in a dispute is necessarily dependent upon the prior existence of an agreement to be bound by the arbitrator's decision. It follows that where, as here, the dispute involves the question of the *very existence of any agreement at all, (including any agreement to arbitrate)* there is nothing upon which an arbitrator can act. This is underscored by the failure of the District Court to order arbitration in conjunction with its grant of equitable relief, as required by *Boys Markets.*

Nor did this Court, in *Boys Markets*, make the question of an employer's entitlement to anti-strike injunctive relief dependent upon the correctness or incorrectness of the union's position as might ultimately be determined by a federal District Court sitting far removed from the pressures, tensions and urgency of the day-to-day problems of the collective bargaining relationship. Instead, the test established by *Boys Markets* is whether or not the underlying dispute is an arbitrable one. In this way, the Court was attempting to harmonize the federal anti-injunction policy of Norris-LaGuardia with the national labor policy favoring settlement of industrial disputes by arbitration, without undermining the vitality of either policy. The Court of Appeals decision in this case is in full accord with *Boys Markets* and with the policy embodied in that decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID SCRIBNER
Counsel for Respondents

March 17, 1972